1982

State of Utah v. Thomas Dean Lakey : Brief of Respondent

Utah Supreme Court

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David L. Wilkinson; Attorneys for Plaintiff-Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18250
THOMAS DEAN LAKEY,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a judgment of conviction of Theft by Deception in the Fourth Judicial District Court in and for Utah County, the Honorable George E. Ballif, Judge, presiding.

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with Theft by Deception in violation of Utah Code Ann., § 76-6-405(1) and § 76-6-412 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and convicted of Theft by Deception on October 29, 1981 in the Fourth Judicial District Court, the Honorable George E. Ballif presiding. Sentence was imposed on January 22, 1982 ordering appellant to be confined for an indeterminate term of not less than one nor more than fifteen years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The respondent seeks an order of this Court affirming the judgment of the court below.

STATEMENT OF THE FACTS

The appellant approached Richard Ryan, a sales representative for clothing companies, at a trade show in Salt Lake City (R. 96). Appellant asked Ryan to show him some samples as he was interested in buying them (R. 97). On January 30, 1981 after a telephone conversation confirming that appellant wished to make a purchase and at appellant's request, Ryan appeared at appellant's store in Provo (R. 97). Ryan took with him some clothing samples which he sold to appellant at cost for $2,763.18 (R. 98, 102, 156). The parties had previously agreed during their phone conversation that the sales price would be paid in full on delivery (R. 98). Appellant paid for the goods with a personal check which he requested Ryan not to cash that day, but to deposit it in his bank account instead (R. 98). Ryan understood that the check would clear appellant's account but that if it were cashed that day, problems would be created with other checks issued by the appellant (R. 99). Appellant told Ryan that he would pay cash if Ryan would return on the following Monday (R. 136). Ryan could not return on Monday because he was leaving town and agreed to take the check and deposit it in his account (R. 99). Ryan would not have left the clothing with appellant if he had known the check would not be paid (R. 99). That day, after depositing the check, Ryan left town to travel to Idaho. Upon his return, Ryan discovered the check

given to him by appellant had not been paid (R. 101). The check was twice presented to appellant's bank and returned marked "Insufficient Funds" and, later, "Account Closed" (R. 106).

An employee of the bank in which appellant's account was located testified that the account was closed on February 10, 1981 because of the excessive number of checks presented for payment against insufficient funds (R. 106, 116, 117). The bank's copy of a statement of the status of appellant's account dated January 5, 1981 showed the balance to be $1,526.04. Although four deposits were made during the month of January, at no time was the balance greater than it was on January 5 (R. 114). During January, other checks drawn on insufficient funds were returned unpaid by appellant's bank. Each time such a check was returned, the bank mailed a notice to appellant informing him of that action. Neither these notices nor the January 5, 1981 statement was returned to the bank as undeliverable by the postal service (R. 113). Appellant testified that he knew there were insufficient funds in his account on the day he issued the check to Ryan (R. 145).

As of the date of trial, Ryan had not been paid for the merchandise nor had it been returned to him (R. 102). The goods were never offered to Ryan and by February 28, 1981 approximately two-thirds of the goods were no longer in

appellant's store (R. 154). Appellant did offer to pay Ryan 10 per cent of the amount due per month after the charge against him was filed; however, Ryan did not accept any payments (R. 156).

ARGUMENT

POINT I

THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT.

The statute under which appellant was convicted provides that:

> a person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.

Utah Code Ann., § 76-6-405 (1953), as amended. The terms used in this section are defined in Utah Code Ann., § 76-6-401 (1953), as amended, as follows:

> (3) "Purpose to deprive" means to have the conscious object:
>
> (a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or
>
> . . .
>
> (c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.
>
> . . .
>
> (5) "Deception" occurs when a person intentionally:
>
> (a) Creates or confirms by words or conduct an impression of law or fact that

> is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or
>
> (b) fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true; or . . .
>
> (e) Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

A. THE EVIDENCE WAS SUFFICIENT TO PROVE THAT THE APPELLANT OBTAINED PROPERTY BY DECEPTION.

Under the statutory definition of deception in subsection (5)(a) above, the appellant must have created a false impression in the mind of Ryan that the appellant did not believe to be true. This definition was met by the evidence that appellant did not inform Ryan that there were not sufficient funds in appellant's account to cover the check. Ryan testified that he understood that appellant had sufficient funds to cover the check issued to him but that other checks had been written that would be dishonored if Ryan cashed his check on the day of issue. According to Ryan's testimony, appellant only went so far as to request Ryan not

to cash the check so as not to "mess up" his other transactions. Appellant never stated in so many words that the check was not good that day. Ryan was never told not to cash the check because he would not get paid; he was told not to cash the check because it might cause appellant problems with his account when other checks were later presented. Silence on the part of appellant concerning the fact that there were insufficient funds left Ryan with a false impression that there were sufficient funds.

Appellant asserts as a defense that "at no time did [he] represent that the check was good at that time" (Appellant's Brief, p. 5). Neither did he represent, however, that the check was not good. Appellant, in fact, said nothing relating to the current status of his account. The only reference was to what would happen in the future if Ryan cashed the check that day.

This Court has said that "fraud by silence, when circumstances require honest disclosure, may constitute grounds for prosecution as well as false statements." Ballaine v. District Court, 107 Utah 247, 153 P.2d 265, 268 (1944). In the instant case, honest disclosure was clearly required because the representation created a false impression that the appellant knew was not true. Appellant admitted at trial that he knew at the time he issued the check to Ryan that there were not sufficient funds in the account. Also,

the bank had mailed to appellant a statement of the status of his account and notices of other checks that were not paid because of insufficient funds. Appellant's silence on the fact of the status of his account was deception because he knew what the status of the account was, and without regard to that knowledge, proceeded to create the impression in Ryan's mind that the check was good.

Appellant, of course, has his own version of these facts. He testified that Ryan knew he could not cash the check because there were insufficient funds. Appellant asserts that the impression of fact he created was that he intended to make some deposits so that the check would be paid if it was deposited in Ryan's checking account. Even assuming that the jury believed these to be the facts, they could still find that there was a deception because an impression of fact was created that did not turn out to be true. No deposit was made to appellant's account that raised the balance enough to cover the check issued to Ryan.

Appellant, however, contends that, even if he created the impression that deposits would be made and that impression was false, he did not act knowing that he was creating a false impression. Appellant asserts that he did not know that he would not receive money that had been promised to him by an investor. In fact, appellant argues, he fully believed he would receive money from this investor.

The only evidence presented at trial on this issue was that offered by appellant's own testimony. Appellant testified that he had received many promises of cash to invest in his business but that none of these promises had ever materialized either before or after January 30, 1981. Appellant argues that because no evidence was introduced that was directly contrary to the assertion that he believed he would receive money to deposit in his bank account, then the jury must have believed his testimony to be fact. If the jury believed this testimony, according to the appellant, then there was insufficient evidence to prove beyond a reasonable doubt that he knew the check would not be paid. This Court has said, however, that:

> [t]he evidence relied upon by the jury need not refute contrary allegations made by the defendant, as long as the jury verdict is supported by substantial evidence . . . the burden of proof applicable in all criminal cases [is] beyond a reasonable doubt. The key word . . . is that of "reasonable." In [this] case, the jury simply did not deem the defendant's explanation of his actions as being "reasonable."

State v. Lamm, Utah, 606 P.2d 229, 232 (1980). Although no evidence was introduced that directly contradicted the appellant's testimony, there was substantial evidence supporting the opposite conclusion. Appellant testified that he had been given many promises of cash to invest in his

business but none had ever materialized either before or after the date on which he purchased the goods from Ryan. From this testimony, the jury could reasonably infer not only that appellant did not know he would receive the money but that he knew in all probability he would not receive the money before Ryan's check was presented for payment. In the face of numerous broken promises, it was not reasonable for appellant to believe that the promises would be fulfilled on this occasion.

Appellant further asserts that the jury was not free to reach any conclusion other than that his version of the facts was true. The jurors, however:

> were not obligated to accept as true defendant's own version of the evidence nor his self-exculpating statements as to his intentions and his conduct. They were entitled to use their own judgment as to what evidence they would believe and to draw any reasonable inferences therefrom.

State v. Gorlick, Utah, 605 P.2d 761 (1979). The jury could reasonably have believed that the appellant here knew that there would not be funds in his account to cover the check issued to Ryan because appellant knew that the funds were insufficient at the time he issued the check and that the promise of money from investors was not reliable. They were not bound to believe that appellant even had any potential investors as he testified. The weight and credibility of

the testimony was a matter for the jury to determine. State v. Daniels, Utah, 584 P.2d 880, 883 (1978). See also: State v. Asay, Utah, 631 P.2d 861 (1981); State v. Gorlick, Utah, 605 P.2d 761 (1979). They have done so by finding the appellant guilty of the offense.

The element of the offense requiring that the representation be likely to affect the judgment of another in the transaction was clearly proved by the evidence. Ryan testified that he thought appellant had funds to cover the check on that day and that if he had thought that the check was not good he never would have left the goods at the store. Ryan relied on the representation made by appellant that the check would be paid if it were cashed on the day of the sale. As a mere courtesy, Ryan refrained from cashing the check so that appellant would not run the risk of other checks being dishonored. The judgment to leave the goods with appellant on this basis was clearly influenced by Ryan's understanding that he could, in fact, have cashed the check that day if he so desired.

B. THE EVIDENCE WAS SUFFICIENT TO PROVE THAT THE APPELLANT OBTAINED PROPERTY FROM RYAN WITH A PURPOSE TO DEPRIVE HIM THEREOF.

To prevail on a claim of insufficient evidence, the appellant must establish:

> that the evidence was so inconclusive or insubstantial that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime charged.

State v. Kerekes, Utah, 622 P.2d 1161, 1168 (1980) [citation omitted]. On review:

> this Court [must] review the evidence and all inferences which may be reasonably drawn therefrom in the light most favorable to the verdict of the jury.

Id. Reviewing the facts in the instant case in the light most favorable to the verdict establishes that the jury may have reasonably concluded that the appellant intended to defraud Ryan. These facts are that: (1) the appellant knew he did not have the funds in his account to cover the check when he issued it; (2) appellant created an impression that he did have sufficient funds in his account; (3) the check was not paid; (4) appellant never offered to return Ryan's merchandise; (5) approximately two-thirds of the goods were no longer in appellant's possession by February 28, 1981 yet Ryan had not been paid for any of the goods; (6) appellant made sure Ryan understood the sale could not take place that day unless the check was accepted, thus taking advantage of the fact that Ryan was going out of town and could not return to negotiate the sale on a later day; (7) appellant did not inform Ryan of any problems with payment when he invited him to come to the shop that day with the merchandise although

he knew Ryan wanted to make the sale of the goods or not come at all.

From the foregoing facts, it is clear that the evidence introduced at trial was not only sufficient, but overwhelmingly so. That the jury may have chosen to disblieve the appellant's testimony is not sufficient reason to conclude that the evidence upon which the verdict was based was so insubstantial that they must have entertained a reasonable doubt. The evidence presented that supports the verdict was more than sufficient to sustain appellant's conviction. From that evidence, it was reasonable for the jury to conclude that appellant possessed the requisite intent to deprive Ryan of the merchandise at the time of the transaction.

In the alternative, appellant argues that his offer to pay 10 per cent of the purchase price per month negates the evidence that he possessed the intent to permanently deprive. This offer, however, came only after investigation had begun and a determination to charge the appellant with the offense had been made. The fact that an offer of restitution was made after the appellant discovered he was in jeopardy does not prove what his intent was at the time of the incident. Also, such an offer does not change the fact that Ryan was actually defrauded. This Court said in State v. Casperson, 71 Utah 68, 75, 262 P. 294, 296 (1927) that:

> The actual fraud and prejudice required . . . is determined according to the situation of the victim immediately after he parts with his property. . . . [I]f he then stands without the right or thing it was pretended he would then have, he has been defrauded and prejudiced by reason of the false pretense, and the offense is complete, notwithstanding thereafter he may regain his property, or the person obtaining it or another compensates him, or he thereafter obtains full redress in some manner not contemplated when he parted with his property.

In Casperson, the defendant was convicted of obtaining property by false pretenses. The conviction was reversed by this Court because the victims had received what they bargained for and had lost nothing.

The above language was quoted by this Court in a more recent case in which the defendant was convicted of theft by deception. In that case, the Court found that the victims had not received what they bargained for but reversed the conviction on other grounds. State v. Walton, Utah, 646 P.2d 689, 691 (1982).

In the instant case, the victim, at the time he parted with his property, had only received in return a worthless check. At the time of the transaction, Ryan did not receive what he bargained for and was therefore defrauded. The fact that the appellant later attempted to make restitution does not change the situation at the time of the transaction. If the deception would have been complete where

Ryan had actually received restitution, then it must also be complete where he has received none.

CONCLUSION

The evidence presented at trial was sufficient to show that the appellant received property by deception with a purpose to deprive Ryan thereof. Regardless of the fact that the evidence was not directly contrary to the testimony of the appellant, it was substantial enough to support the conclusion that appellant had created a deception. The jury was free to believe or not believe the testimony presented by the appellant as explanation of his behavior. If the jury chose to disbelieve that testimony, they could reasonably infer that the appellant knew he was creating a false impression at the time of sale.

The appellant has not shown that the evidence was so inconclusive that reasonable minds must have held a reasonable doubt as to his guilt. Reviewing the evidence in the light most favorable to the verdict reveals, in fact, that it was more than sufficient to support the verdict. Where the evidence shows that the appellant obtained property by deception with a purpose to deprive at the time of the transaction, evidence that he later attempted to make restitution does not change the fact that the victim was defrauded. The verdict of the jury, therefore, should be affirmed.

Respectfully submitted this 6th day of December, 1982.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Kent O. Willis, Attorney for Appellant, 43 East 200 North, P.O. Box "L", Provo, Utah, 84603, this 6th day of December, 1982.

Susan Patton